

CHERYL BUCKLEY,)
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) **Plaintiff,**)
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) **vs.**) **Case No. CIV-15-65-R**
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) **CAROLYN W. COLVIN,**)
) **Commissioner of the Social**)
) **Security Administration,**)
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)
) **Defendant.**)

Before the Court is a Report and Recommendation by United States Magistrate Judge Shon T. Erwin entered February 2, 2016, Doc. No. 19. The Magistrate Judge recommended that the decision of the Commissioner of the Social Security Administration denying Plaintiff's application for supplemental security insurance benefits be reversed and remanded. The Magistrate Judge first found that the ALJ erred by failing to consider the effect of Plaintiff's migraines when assessing her residual functional capacity (RFC). *See* Report and Recommendation at pp. 6-7. Specifically, the Magistrate Judge concluded that the ALJ's rationales for discounting Plaintiff's migraines and his failure to include related limitations in the RFC are not supported by substantial evidence and are contradicted by overwhelming contrary evidence. *See id.* at pp. 7-8. In this regard, the Magistrate further found that the ALJ discounted Plaintiff's testimony at both hearings in which the Plaintiff testified that her headaches were "devastating" and often accompanied by nausea, vomiting and sensitivity to light and

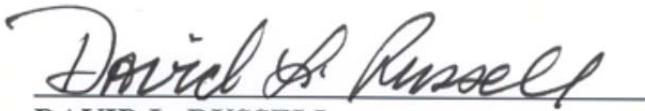
sound, and required her to lie down, relying on Plaintiff's ability to perform activities on the days of the week she was without a headache. Inasmuch as the vocational expert testified that more than two absences from work per month would eliminate all potential employment, crediting as true Plaintiff's allegations of migraine headaches once a week would eliminate all work, the Magistrate Judge said. Thus, the ALJ's rejection of Plaintiff's testimony was not only deficient but fatal to his step five findings, the Magistrate concluded. In addition, the Magistrate Judge found that the ALJ failed to include specific work-related mental limitations in the hypothetical question to the VE. Specifically, the Magistrate Judge found that the ALJ did not include what Dr. Hartley found were marked limitations in the Plaintiff's ability to understand, remember and carry out detailed instructions. Accordingly, the Magistrate Judge concluded the VE's testimony cannot constitute substantial evidence to support the ALJ's decision.

The Commissioner of Social Security Administration has filed an Objection to the Report and Recommendation. Doc. No. 20. The Commissioner first argues that the Magistrate Judge's findings concerning the impact of Plaintiff's migraine headaches on Plaintiff's RFC constitute an impermissible weighing of the evidence and that there was substantial evidence to support the ALJ's RFC. The Commissioner's second argue is difficult to follow but the Commissioner argues that the ALJ reasonably established Plaintiff's mental residual functional capacity. The Commissioner does not address the ALJ's omission of Plaintiff's marked limitations in work-related activities in the hypothetical to the VE.

A decision is not based on substantial evidence if other evidence in the record overwhelms the evidence on which the ALJ relied. *Grogan v. Barnhart*, 399 F.3d 1257, 1261-62 (10th Cir. 2005); *Branum v. Barnhart*, 385 F.3d 1268, 1270 (10th Cir. 2004). Upon the Court's review of the ALJ's decision, the record herein, the Report and Recommendation, the Commissioner's Objection and the brief in support of the Commissioner's decision [Doc. No. 18], the Court agrees with the Magistrate Judge that the ALJ erred in failing to consider the effects of Plaintiff's migraine headaches in assessing Plaintiff's RFC and that as a result, the ALJ's RFC assessment is not supported by substantial evidence. Additionally, the Court finds that the ALJ's failure to include in his hypothetical to the VE Plaintiff's marked work-related limitations was error and renders the decision at step five not supported by substantial evidence.

In accordance with the foregoing, the Report and Recommendation of the Magistrate Judge is ADOPTED and the decision of the Commissioner is REVERSED and REMANDED for further administrative proceedings.

IT IS SO ORDERED this 19th day of February, 2016.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE